A

LEE AH MOK & ORS

v.

PENTADBIR TANAH DAERAH SEREMBAN & ANOR

B

COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
ABU SAMAH NORDIN JCA
AHMAD MAAROP JCA
[CIVIL APPEAL NO: N-01-78-08]

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28 OCTOBER 2008

LAND LAW: *Acquisition of land - Objection against compensation - Whether objection filed within statutory time period - Whether land office negligent - Whether triable issues raised - Whether appellants entitled to*

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make reference to court - Land Acquisition Act 1960, ss. 38(1), (4), (5), 45, Forms H, N

LAND LAW: *Acquisition of land - Reference to court - Application to dismiss or strike out - Application by way of summons-in-chambers - Whether wrong mode - Whether land reference matters to be heard in*

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open court only - Land Acquisition Act 1960, s. 45

The appellants' land was acquired by the 1st respondent under the Land Acquisition Act 1960 ('the Act'). Dissatisfied with the amount of compensation awarded to them, they lodged their

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objection under s. 38(1) of the Act by filing the statutory Form N requiring the 1st respondent to refer the matter to the court for determination. The 1st respondent received the objection on 27 January 1995 but did not process nor respond until the appellants made some inquiries as to its status. By then, the

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appellants were already out of the three-month time period stipulated by s. 38(5) of the Act. The appellants then applied successfully to the court for an extension of time under s. 38(4) of the Act. They re-filed their objection that was duly referred to the court for determination. The 2nd respondent applied to

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intervene as an interested party on the premise that it had paid the award for the acquired land and that it had to pay for any additional award in the event additional payments were required. The court allowed the application to intervene. Thereafter, the 2nd respondent applied to dismiss or strike out the land reference

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under O. 92 r. 4 of the Rules of the High Court 1980, *inter alia*,

that it was an abuse of the process of the court and that the appellants had accepted the compensation without protest. The learned judge gave an "order in terms" in favour of the 2nd respondent on the sole ground that the objection in Form N was not filed within the stipulated time period. The appellants appealed.

Held (allowing the appeal)
Per Suriyadi Halim Omar JCA:

(1) Although the appellants accepted the offer for additional compensation, it was also made under protest followed by the filing of the statutory Form N. That Form N too was not processed by the 1st respondent within the stipulated time period. (para 7)

(2) The appellants had no knowledge of the existence of the 2nd respondent or the supposed payment of award by them. As far as the appellants were concerned, the 1st respondent granted the award and issued the relevant cheque. The court viewed the relevant cheque and found it to be paid by the Menteri Besar Negeri Sembilan Corporation and not by the 2nd respondent. In fact, every official document filed in the appeal record bore no signature, name or connection to the 2nd respondent. (para 8)

(3) The evidence showed that the appellants did not receive the necessary Form H as required by s. 16 of the Act which should include an extract of the Land Administrator's written award. Even if they did, the award was rejected hence sufficiently informing the land office of their objection. In the circumstances, the requirement of filing Form N became superfluous. Further, the gross sum supposedly received by one of the appellants as reflected by the receipts did not correspond with the amount stated in the Form H that led to a triable issue. (para 9)

(4) If the court were to increase the compensation award, the 2nd respondent would not be prejudiced because there was already a consensual agreement for compensation to be paid by the 1st respondent. There was no cogent evidence that the 2nd respondent had anything to gain or lose from the land acquisition. Any assumption of responsibility for payment

as ventilated by the 2nd respondent or its nexus to the land reference was not corroborated by the 1st respondent. The appellants, on the other hand, had much to lose either by any delay or the striking out action. (para 10)

(5) The learned judge merely stated "order in terms" in favour of the 2nd respondent. It was not clarified whether the land reference was dismissed or struck out. The two orders were different with special provisions to deal with in the event of any dissatisfaction. Generally, the procedure to be adhered to pursuant to a dismissal order is to file an appeal whilst in a striking out order, it is a re-instatement application. That confusion itself was sufficient ground to allow the appeal or set aside the order. (para 11)

(6) Section 45 of the Act is a mandatory provision providing that every land reference proceedings under Part V shall take place in open court. In the present case, the order of the learned judge was meted down in chambers and not in open court. Regardless of whether it was a dismissal or a striking out order, the order was tainted and that was a sufficient ground for setting aside the order. (para 12)

(7) There was no order attached in the appeal records permitting the 2nd respondent to intervene in the land reference matter. Even if the latter were permitted to intervene, the order handed down was not by a High Court judge but by a Senior Assistant Registrar and given in chambers contrary to s. 45 of the Act. Even though the appellants did not appeal against that order, they did ventilate that they reserved the right to apply for a setting aside of that order. The 1st respondent at no time corroborated or supported the assertion of the 2nd respondent that it was the source of the compensation payment. Evidence showed otherwise. (paras 14 & 15)

(8) There was *prima facie* evidence that the appellants sufficiently informed the land office of their objection of the award. The appellants too had filed the necessary Form N as a backup course of action. That filing was made way back on 17 January 1995 and acknowledged by the land office though not processed. The appellants should not be

made to suffer for the negligence or indolence of the land office. To allege that the appellants never objected to the sum offered to them was an erroneous factual finding in the light of the above clarification. (para 16)

(9) Despite the matter under appeal being a land reference matter, the 2nd respondent made the application via summons-in-chambers pursuant to O. 92 r. 4 RHC. That said order was a High Court judge's inherent power empowerment provision. No reference was made to any provision in the Act, or the RHC in the like of O. 18 r. 19 intituled in the summons-in-chambers in support of the application. In spite of the glaring procedural weaknesses on the face of the documentation, the draconian remedy was still adverted to. (para 17)

(10) The fact that the compensation sum was increased by RM5,000 per acre was *prima facie* evidence of the existence of some dissatisfaction leading to a reasonable cause of action. Even if the likelihood of success was uncertain, as long as the land reference disclosed some ground of action, it should not be struck out. It followed that it could not be said that the land reference was unsustainable in view of the abundant triable issues before the court. (para 18)

Per Abu Samah Nordin JCA:

(1) The appellants' objection in Form N was not filed out of time. The covering letter from the appellants' solicitors enclosing fresh copies of Form N together with the requisite deposit as required by s. 39 of the Act was duly received and acknowledged by the 1st respondent, well within the 30-day period granted by the court. (para 36)

(2) Form H at the material time did not contain any stipulation that an interested person must state whether he accepted the compensation under protest or otherwise. He was only required to sign the form as an acknowledgement that he had received the compensation or that he did not accept the offer of compensation by the Land Administrator. Form H was issued on 30 July 1994 and was subsequently amended and replaced by a new Form H by the Land Acquisition (Amendment) Act 1997 that came into force on 1 March

A 1998. It was only in the new Form H that an interested person was required to state whether or not he accepted the offer of compensation under protest. In any event, none of the appellants had signed the said Form H and their contention that they were never served with the said form
B remained unrebutted as the 1st respondent did not file any affidavit to state the contrary. (paras 37, 38 & 39)

(3) The 2nd respondent's application to dismiss or strike out the land reference by way of a summons-in-chambers was not
C made in accordance with the mandatory provision of s. 45 of the Act. The said section required every proceeding under Part V to take place in open court. It was manifestly clear that the proceedings in the High Court took place in chambers and not in open court. (para 40)

D ***Bahasa Malaysia*** *Translation Of Headnotes*

Tanah perayu-perayu diambil oleh responden pertama di bawah Akta Pengambilan Tanah 1960 ('Akta tersebut'). Perayu-perayu tidak puas hati dengan pampasan yang diawardkan mereka.
E Mereka membuat bantahan di bawah s. 38(1) Akta tersebut dengan memfailkan borang statutori, Borang N yang mengkehendaki responden pertama merujuk perkara tersebut ke mahkamah untuk penentuan. Responden menerima bantahan tersebut pada 27 Januari 1995 tetapi tidak memproses atau menjawab sehingga
F perayu-perayu mempersoalkan status bantahan tersebut. Dalam pada itu, tempoh masa tiga bulan yang di peruntukkan oleh s. 38(5) Akta tersebut untuk perujukan tanah telah tamat. Perayu-perayu berjaya memohon untuk perlanjutan masa di bawah s. 38(4) Akta tersebut. Mereka memfailkan lagi bantahan mereka
G yang seterusnya dirujuk kepada mahkamah untuk penentuan. Responden kedua memohon mencelah sebagai parti yang berkepentingan atas alasan yang award pampasan tersebut dibayar olehnya dan apa-apa pembayaran tambahan jika diperlukan akan dibayar olehnya. Mahkamah membenarkan permohonan tersebut.
H Selepas itu, responden memohon untuk menolak atau membatal perujukan tanah tersebut di bawah O. 92 r. 4 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), inter alia, atas alasan bahawa ia merupakan suatu penyalahgunaan proses mahkamah dan bahawa perayu-perayu menerima pampasan tersebut tanpa protes. Yang
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arif hakim memberikan "order in terms" memihak kepada responden kedua atas alasan bahawa bantahan dalam Borang N tidak difailkan dalam masa yang ditentukan. Perayu-perayu kini merayu.

Diputuskan (membenarkan rayuan):
Per Suriyadi Halim Omar HMR

(1) Pampasan tambahan juga diterima perayu-perayu dengan protes diikuti dengan pemfailan Borang N. Borang tersebut juga tidak diproseskan responden pertama dalam masa yang ditetapkan.

(2) Perayu-perayu tidak mengetahui tentang kewujudan responden kedua ataupun pembayaran award yang seandainya dibuat mereka. Bagi perayu-perayu, pemberian award tersebut dan pengeluaran cek berkenaan adalah daripada responden pertama. Mahkamah mendapati cek berkenaan dibayar oleh Koperasi Menteri Besar Negeri Sembilan dan bukannya responden kedua. Lebih-lebih lagi, setiap dokumen rasmi yang difailkan di dalam rekod rayuan tidak mempunyai tandatangan, nama atau kaitan dengan responden kedua.

(3) Keterangan menunjukkan bahawa perayu-perayu tidak menerima Borang H berkenaan seperti yang diwajibkan s. 16 Akta tersebut yang sepatutnya menyertakan petikan award bertulis pentadbir tanah. Jikapun mereka menerima award tersebut, ianya ditolak maka memaklumkan pejabat tanah secukupnya mengenai bantahan mereka. Dalam keadaan demikian, tiada keperluan memfailkan Borang N. Lagipun, jumlah kasar seandainya diterima oleh salah seorang daripada perayu-perayu yang dipaparkan dalam resit berkenaan tidak sejajar dengan amaun yang dicatat dalam Borang H, seterusnya membawa kepada satu isu bicara.

(4) Jika mahkamah menambahkan award pampasan, responden kedua tidak akan diprejudiskan kerana adanya satu perjanjian persetujuan bagi pampasan untuk dibayar oleh responden pertama. Tiada keterangan menyakinkan bahawa responden kedua akan untung atau rugi daripada pengambilan tanah tersebut. Tanggungjawab pembayaran sepertimana yang dihujah responden kedua atau kaitannya dengan rujukan

A tanah tersebut tidak disokong oleh responden pertama. Sebaliknya, perayu-perayu akan rugi banyak sekira terjadinya kelewatan atau pembatalan tindakan.

(5) Yang arif hakim hanya memberi perintah "order in terms" B memihak responden kedua. Ianya tidak dijelaskan sama ada perujukan tanah ditolak atau dibatalkan. Kedua perintah tersebut berlainan dengan peruntukan khas masing-masing untuk dipatuhi jika terdapat ketidakpuasan hati. Secara amnya, prosedur yang mesti dipatuhi berikutan perintah C penolakan adalah untuk memfailkan rayuan manakala bagi perintah pembatalan pula ianya adalah permohonan menghidupkan semula kes. Kekeliruan itu sendiri merupakan alasan yang cukup untuk membenarkan rayuan atau mengenepikan perintah tersebut.

D **(6)** Seksyen 45 Akta tersebut adalah satu peruntukan mandatori yang memperuntukkan bahawa setiap rujukan tanah di bawah Bahagian V mesti diadakan di mahkamah terbuka. Dalam kes semasa, perintah mahkamah diberikan di dalam kamar dan bukan di mahkamah terbuka. Tanpa menghiraukan sama ada E perintah tersebut merupakan perintah penolakan atau pembatalan, perintah tersebut tercemar dan ianya merupakan alasan mencukupi untuk mengenepikan perintah tersebut.

(7) Tiada perintah yang dilampirkan dalam rekod rayuan F menunjukkan kebenaran responden kedua mencelah dalam perkara perujukan tanah tersebut. Jikapun dibenarkan mencelah, perintah yang diberikan bukan daripada hakim Mahkamah Tinggi tetapi daripada Penolong Pendaftar Kanan dan diberikan di dalam kamar bertentangan dengan s. 45 G Akta tersebut. Walaupun perayu-perayu tidak merayui perintah tersebut, mereka sememangnya mengudarakan bahawa mereka berhak membuat permohonan mengenepikan perintah tersebut. Responden pertama tidak sekalipun menyokong pendakwaan responden kedua yang ia adalah H punca pembayaran pampasan itu. Keterangan menunjukkan sebaliknya.

(8) Keterangan *prima facie* menunjukkan bahawa perayu-perayu memaklumkan pejabat tanah secukupnya mengenai bantahan I mereka terhadap award tersebut. Perayu-perayu juga menfailkan Borang N berkenaan sebagai tindakan sokongan.

Pemfailan itu dibuat pada 17 Januari 1995 dan diakuiterima oleh pejabat tanah walaupun tidak diproseskan. Perayu-perayu tidak sepatutnya menderita akibat kecuaian atau ketidakcergasan pejabat tanah. Memandangkan penjelasan ini, pendakwaan bahawa perayu-perayu tidak pernah membantah jumlah yang ditawarkan merupakan dapatan fakta yang tersilap.

(9) Meskipun perkara di bawah rayuan merupakan perkara perujukan tanah, responden kedua membuat permohonan melalui saman dalam kamar berikutan A. 92 k. 4 KMT. Aturan tersebut adalah peruntukan kuasa sedia ada hakim Mahkamah Tinggi. Tiada rujukan kepada mana-mana peruntukan Akta atau KMT sepertimana A. 18 k. 19 yang bertajuk di saman dalam kamar menyokong permohonan. Meskipun kelemahan-kelemahan yang menonjol dalam prosedur dokumentasi ini, remedi yang keras telah dirujuk.

(10) Fakta bahawa jumlah pampasan ditambahkan RM5,000 setiap ekar merupakan keterangan *prima facie* kewujudan ketidakpuasan hati seterusnya membawa kepada suatu kausa tindakan yang munasabah. Jikapun kemungkinan kejayaan tidak pasti, asalkan perujukan tanah mendedahkan lebih kurang satu alasan tindakan, ia tidak patut dibatalkan. Ianya mengikut bahawa tidak boleh diperkatakan perujukan tanah tersebut tidak boleh dipertahankan memandangkan isu-isu bicara yang banyak di hadapan mahkamah.

Oleh Abu Samah Nordin HMR:

(1) Bantahan perayu-perayu dalam Borang N tidak difailkan di luar masa. Surat daripada peguam perayu-perayu melampirkan salinan-salinan baru Borang N bersama deposit berkenaan sepertimana yang diperlukan s. 39 Akta diakui terima oleh responden pertama dalam tempoh had masa 30 hari.

(2) Pada masa material, Borang H tidak mengandungi apa-apa syarat bahawa seorang yang berkepentingan mesti menyatakan sama ada dia menerima pampasan dengan protes atau tidak. Dia hanya diperlukan untuk menandatangani borang sebagai satu akuan yang dia telah menerima pampasan atau tidak menerima tawaran pampasan daripada Pentadbir Tanah. Borang H dikeluarkan pada 30 Julai 1994 dan kemudiannya dipinda dan digantikan oleh satu Borang H

baru oleh Akta Pengambilan Tanah (Pindaan) 1997 yang berkuatkuasa pada 1 March 1998. Hanya dalam Borang H baru dinyatakan bahawa seorang berkepentingan dikehendaki untuk menyatakan sama ada dia terima atau tidak tawaran pampasan dengan protes. Namun demikian, tiada perayu-perayu yang menandatangani Borang H tersebut dan hujahan mereka bahawa mereka tidak diberikan borang tersebut masih belum dipatahkan kerana responden pertama tidak memfailkan apa-apa afidavit untuk menyatakan sebaliknya.

(3) Permohonan kedua responden untuk menolak atau membatal perujukan tanah melalui saman dalam kamar tidak dibuat mengikut peruntukan mandatori s. 45 Akta. Seksyen tersebut mengkehendaki setiap prosiding di bawah Bahagian V untuk berjalan di mahkamah terbuka. Ianya jelas sekali yang prosiding di Mahkamah Tinggi berlaku di kamar dan bukannya di mahkamah terbuka.

Case(s) referred to:

Abu Bakar Hj Yusof v. Mohamed Hamzah Hanapiah & Anor [1978] 2 MLJ 78 ***(refd)***

Badiaddin Mohd Mahidin v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Harkness v. Bell's Asbestos and Engineering Ltd [1967] 2 QB 729 ***(refd)***

Peramina v. Kartika Ratna Tahir & Ors [1983] 1 MLJ 136 ***(refd)***

Siaw Kim Seong v. Siew Swee Yin & Anor [2008] 5 CLJ 441 CA ***(refd)***

Legislation referred to:

Land Acquisition Act 1960, ss. 30(b), 36-51, 37(1), 38(1), (4), (5), 39, 45

Rules of the High Court 1980, O. 18 r. 19, O. 92 r. 4

For the appellant - Noor Hamiza Ab Hamid; M/s Abdul Razak Muhidin & Assoc

For the 1st respondent - Dato' Ishak Sahari; State Legal Advisor Negeri Sembilan

For the 2nd respondent - Sean HM Yeow (R Himahlini with him); M/s Lee Hishammuddin & Gledhill

[Appeal from High Court, Seremban; Land Reference No: 15-2-2003]

Reported by Usha Thiagarajah

JUDGMENT

Suriyadi Halim Omar JCA:

[1] The appeal was allowed with costs by this panel and accordingly had set aside the order of the judge. I will now attempt to explain how this appeal came about. The matter began with the applicants (hereinafter referred to as the appellants), being the registered owners of lot 876 Hakmilik G 21012, Mukim Labu and Mukim Setul, District of Seremban (the land), having filed a land acquisition reference at the High Court on 19 February 2003. The Pentadbir Tanah Daerah Seremban (hereinafter referred to as the 1st respondent) had acquired the land in 1993. For easy reference the singular refers to the plural and *vice versa*.

[2] The 2nd respondent is the intervener. Its right to intervene came about on the premise that it was the responsible party who paid the award for the acquired land and also to pay for any additional award, in the event additional payments were required. Armed subsequently with a court acquired right to intervene the 2nd respondent on 29 March 2006 filed a summons in chambers (hereinafter referred to as the SIC) for an order that the land reference proceedings be dismissed or struck out.

[3] The SIC reads as follows:

> Benarkan semua pihak yang berkenaan hadir dihadapan Hakim ... mendengarkan permohonan di pihak Responden Ke-2 yang dinamakan di atas menurut Aturan 92 Kaedah 4 Kaedah-Kaedah Mahkamah Tinggi 1980 dan/atau bidangkuasa sedia ada Mahkamah yang Mulia ini untuk perintah-perintah berikut:
>
> (1) Prosiding rujukan tanah disini hendaklah ditolak atau dibatalkan;
>
> (2) Kos permohonan ini dan prosiding rujukan tanah di sini dibayar oleh Pemohon pemohon kepada Responden Ke-2; dan
>
> (3) Relief selanjutnya atau selainnya yang difikirkan wajar dan sesuai oleh yang Mulia ini.
>
> ....

[4] It was obvious that the 2nd respondent wanted the land reference dismissed or struck out on the basis that the court had the inherent jurisdiction to do so. The learned judge gave "order in terms".

[5] The locus or right to apply to court to challenge the award is governed by s. 37 of the Land Acquisition Act 1960 (Act 486) (hereinafter referred to as the Act), whereby only a person who either has not accepted the award or has accepted under protest, is entitled to apply to court to challenge the award. Further, pursuant to s. 30(b) of the Act, any person who has received payment of the award other than under protest, shall not be entitled to require his claim be referred to court under the above section. Section 30(b) is a mandatory provision, as once a person has received an award without protest he is estopped from protesting later, based on the doctrine of election. It was the contention of the 2nd respondent that the appellants in 1994 had accepted part of the award without any protest. With that acceptance, the challenge as against the award was extinguished and the appellant was statutorily barred from protesting further. According to the SIC the land reference proceedings is an abuse of the process of law now that the appellants have received the award without any protest.

History Of The Case

[6] Sifting through the evidence it was obvious that the matter on appeal had a rather chequered history. Even at the outset there was dissatisfaction with the land acquisition and the resultant effect was that legal advice was sought by the appellants. Messr. Adlan & Haji Suhaimi which initially represented the owners of the land had filed the objection on their behalf of the acquisition all the way back to 17 January 1995. Unfortunately the 1st respondent failed to process the objection on some ground or other. *Vide* letter dated 3 December 2000 (RR 275) the 1st respondent had kindly agreed that the matter be proceeded with in court. By this date a new set of solicitors had taken over, and on 15 June 2001 the court enlarged the objection time, in order to permit the landowners to forward their written objection to the 1st respondent. On 12 July 2001 the new solicitors submitted the relevant Form N for the appellants together with the deposits. This was not denied by the 1st respondent. The flow of

communication between the appellants and the 1st respondent continued and were still animated and constant until the hearing of the SIC.

[7] From the affidavit evidence, sometime on 6 September 2004 (RR 78) the parties came to a consensus that additional compensation of only RM5,000 per acre would be paid out to the respective appellants by the 1st respondent. By consent too the additional compensation would be effective from June 2001 (see also exh. TNK3 RR 255). By backdating it all the way to 15 June 2001 (RR 255-260), the appellants would not lose out on the interest. Even though the appellants had duly accepted the offer, nevertheless the acceptance was still made under protest, followed by the filing of the statutory Form N. Regretfully that Form N was also not processed by the 1st respondent or the cheques of the deposit ever cashed even though filed within the stipulated time.

[8] High politics with their intricacies were not the forte of the appellants, and they had no knowledge of the existence of the 2nd respondent, or the supposed payment of the award by them. As far as the appellants were concerned the award was made by the 1st respondent and the cheques were issued by it as well. This panel viewed the relevant cheque and saw that it was indeed paid by Menteri Besar Negeri Sembilan Corporation (cheque number 374591 dated 6 December 1994), certainly not by the 2nd respondent. In fact a perusal by us of every official document filed in the appeal record bears no signature, name or connection to the 2nd respondent.

[9] In reply to the 2nd respondent's averments (RR 72), the appellants complained that they were never given the necessary Form H as required by s. 16 of the Act, which shall include an extract of the Land Administrator's written award. This issue came about as the 2nd respondent, in its attempt to establish the acceptance of the compensation as being without protest, had annexed the receipt of acceptance (RR 115-239) and the impugned Form H. Taking one set as an example we take pages RR 115-120 documents signed by one Thong Sek for clarification. For starters a cursory glance by us of R1, ie, the Form H form, show that it was left unsigned (and this was the pattern with practically all the other Form H). By so not signing, it must be interpreted that the appellants never received these documents, or

A if they did, the award was rejected, hence sufficiently informing the land office of their objection. With that backdrop the requirement of filing Form N had become superfluous. The question mark did not end there. The gross sum supposedly received by Thong Sek, as reflected by the receipts, was RM1,708,226.09 but yet his B Form H reads that he only received RM1,063,935. Surely there is something not right here. Whichever way it may be interpreted, due to the favourable interpretation tilting in favour of the appellants, a triable issue had arisen.

C **[10]** The appellants had ventilated that the SIC would prejudice their rights, as it would delay the process of the land reference further, let alone it now had gone past the 10th year. It was not denied that the court had already fixed a hearing date to deal with the award. If not for the SIC filed by the 2nd respondent there D would never have been any objection submitted by anyone as against the land reference. In fact even the 1st respondent was very sympathetic to the appellants' predicament (RR 275). In the event the court was to increase the compensation award, it would not prejudice the 2nd respondent, because there already was a E consensual agreement involving the land acquisition, with the compensation to be paid by the 1st respondent. Then again there is absolutely no cogent evidence adduced anywhere that the 2nd respondent has anything to gain or lose from this land acquisition. Any assumption of responsibility of the payment as ventilated by F the 2nd respondent, or its nexus to the land reference, was never corroborated by the 1st respondent, be it by oral or affidavit evidence. The appellants on the other hand have much to lose either by any delay or the striking out action.

G **Additional Reasons For Allowing The Appeal**

[11] The SIC had prayed for the land reference be dismissed or struck out. Come the decision day the court had merely stated "order in terms". It was not clarified whether the land reference was dismissed or struck out. Any practitioner will be aware that H these two orders are worlds apart, with special provisions to deal with them in the event of any dissatisfaction. Generally speaking, in the event of any dissatisfaction, the procedure to be adhered to pursuant to a dismissal order is to file an appeal whilst in a striking out order, a reinstatement application. That confusion in I itself was sufficient ground to allow the appeal or set aside the order.

[12] If the order was a dismissal of the land reference, it would mean that the proceedings was adjudged not in accordance with the special provisions and demands of the Act but pursuant to the High Court Rules 1980. Land reference proceedings are triggered by s. 37, which gives an aggrieved party the right to make an objection, and s. 38 the manner of making the objection. These two provisions fall under Part V which spans from ss. 36 to 51 of the Act. Section 45, a mandatory provision, promulgates that every land reference proceeding under this part, ie, of Part V shall take place in open court. As the name denotes, a summons-in-chambers procedurally is certainly not heard in open court, and it is undeniable that the SIC under discussion was heard in chambers. The perfected order of 13 March 2008 confirms that (Supplementary Appeal Record p 2). In a nutshell, the order of the learned judge was meted down in chambers, and not in open court as statutorily required. Regardless of whether it was a dismissal or a striking out order, it was tainted thus sufficient ground again to set it aside.

[13] Taking a step further, if it was not a dismissal order, then it must be a striking out order. Was it so obvious that the matter was unsustainable?

[14] I start off with some procedural matter, ie, the issue of *locus standi* of the intervener. Regretfully we found no order attached in the appeal records permitting the 2nd respondent to intervene in the land reference matter. Even if the latter were permitted to intervene, the order handed down was not by a High court judge, but by a senior assistant registrar and given in chambers. Again it contravened s. 45 of the Act. Even though the appellants did not appeal against that order they did ventilate that they reserve the right to apply for a setting aside of that order. With cases in the like of *Badiaddin bin Mohd Mahidin v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 which endorses that "where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside" the chances of success are high (*Harkness v. Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729).

[15] How the 2nd respondent got into the affray, and empowered with rights of intervention, when the facts militate against such empowerment, again makes the locus standi order shaky. As stated in the preceding paragraphs the 1st respondent has at no time

corroborated or supported the assertion of the 2nd respondent. According to the 2nd respondent, the source of the compensation payment was it, but yet the cheque made out to the appellants was issued by the Government. With such a doubtful order handed down by the Senior Assistant Registrar, the SIC would have no leg to stand on.

[16] As regards the facts, there was *prima facie* evidence supplied by the appellants that they had sufficiently informed the land office of their objection of the award. For starters the non-signing of practically all the forms of Form H, which were supplied by the 2nd respondent, was dramatic notification of their protests. Even if this interpretation were not accepted, the appellants had filed the necessary Form N as a backup course of action. This filing was made all the way back on 17 January 1995 and acknowledged by the land office though never processed by the latter. The appellants should not be made to suffer for the negligence or indolence of the land office. To say that the appellants never objected to the sum offered to them thus was an erroneous factual finding in light of the above clarification. This submission of the 2nd respondent of want of protest by the appellants also flew in the face of the letters of the State Legal Adviser as annexed at pp. 271 and 275. This by itself was a triable issue.

[17] Despite the matter under appeal being a land reference matter, the 2nd respondent had made the application in the SIC pursuant to O. 92 r. 4 Rules of the High Court 1980, which is a High Court judge's inherent powers empowerment provision. No reference was made to any provision in the Act, or the Rules of the High Court 1980, in the like of O.18 r. 19 intituled in the SIC, in support of the application. Inspite of the glaring procedural weaknesses on the face of the documentation the draconian remedy was still adverted to *(Janeb's Key to Civil Procedure in Malaysia and Singapore)*.

[18] To wind up the matter as regards the existence of a cause of action, no minute and protracted examination of the documents and facts will be required, as it is too obvious for comfort. The fact that the compensation sum was increased by RM5,000 per acre by the 1st respondent subsequently is *prima facie* evidence of the existence of some dissatisfaction, leading to a reasonable cause of action. To add to it, even if the likelihood of success is uncertain, so long as the land reference discloses some ground of

action, it should not be struck out (*Bandar Builder Sdn Bhd. & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; *Abu Bakar bin Haji Yusof v. Mohamed Hamzah bin Hanapiah & Anor* [1978] 2 MLJ 78; *Peramina v. Kartika Ratna Tahir & Ors* [1983] 1 MLJ 136). With the abundant triable issues before the court, it could not be said that the land reference was obviously unsustainable.

[19] On the grounds supplied above, we had no hesitation in allowing this appeal with costs, set aside the order of the High Court, have the deposit refunded, and order the land reference reinstated.

[20] My learned brother Ahmad Hj Maarop, JCA has read this judgment in draft and has agreed with it.

Abu Samah Nordin JCA:

[21] The appellants are the registered owners of part of an undivided piece of land measuring 668.295 acres held under Lot No. 876 Hakmilik G21012 Mukim Labu District of Seremban. The land had been acquired by the first respondent under the Land Acquisition Act 1960 ("the Act") for a public purpose. Being dissatisfied with the amount of compensation awarded by the first respondent, they lodged their objection under s. 38(1) of the Act by filing the requisite Form N, requiring the first respondent to refer the matter for the determination of the court.

[22] It was received by the first respondent on 27 January 1995. By s. 38(5) of the Act the first respondent must within three months of receipt of the objection, subject to s. 39, refer the matter to the court by way of reference in Form O. Unfortunately, due to the first respondent's inaction and oversight the objection was left unattended and never processed. It was only after enquiries by some of the appellants that the first respondent by a letter dated 5 December 2000 wrote to the registered owners informing them that they could still proceed with their objection by filing the necessary documents. By then, the appellants were already out of time if they had to refile their objection. Under such circumstances, they turned to the court to apply for an extension of time under s. 38(4) of the Act.

[23] On 15 June 2001 they obtained a consent order from the High Court for an extension of time to file their objection within thirty (30) days of the said order. The first respondent quite understandably did not object to the said application.

[24] On 12 July 2001 the appellants' solicitors Messrs Abd. Razak Muhidin & Associates submitted nine (9) fresh copies of Form N together with the payments of deposit as required by s. 39 of the Act. This was duly acknowledged by the first respondent on 13 July 2001, by stamping its rubber stamp on a copy of the covering letter from the appellants' solicitors to the first respondent (exh. TNK10).

[25] The first respondent acted accordingly and referred the objection to the court for its determination, *vide* Land Reference No. 15-2-2003.

[26] The second respondent then successfully applied by way of a summons-in-chambers to intervene in the land reference as an interested party. On 29 March 2006, it applied by another summons-in-chambers to dismiss or strike out the land reference and that the costs of the application and the land reference be paid by the appellants. The application was made under O. 92 r. 4 of the Rules of the High Court 1980 ("RHC") on the grounds that:

(a) the land reference was an abuse of the process of court;

(b) the appellants had accepted the compensation as awarded by the first respondent without protest; and,

(c) the appellants were not entitled under s. 30(b) of the Act to make the reference to the court.

[27] The affidavits in support of the second respondent's application was affirmed by its director, one Dato' Gan Kong Hiok. In essence, he restated the grounds of the application as stated in the summons-in-chambers. In addition, he also referred to his affidavit in support of the second respondent's application to intervene. In the said affidavit he deposed that the acquired land was alienated to the second respondent for the purpose of the development of a new township, namely, Bandar Baru Nilai, Negeri Sembilan. Hence it was the party which was responsible for the payment of compensation including any additional

compensation which may be given by the court to the appellants. It had in fact paid the amount of compensation as awarded by the first respondent and contended that the appellants had received their compensation without protest. Any further increase in the amount of compensation by the court would therefore be prejudicial to its interest as it was the party responsible to meet any increase in the said compensation.

[28] The second respondent relied on Form H issued by the first respondent to the appellants and the receipts of acknowledgment by the appellants of the award of compensation as evidence that the appellants accepted the said compensation without protest. Section 37(1) of the Act only allows any interested person to make objection on the amount of compensation if he had accepted it under protest. Any interested person who accepted the award without protest is precluded from objecting to the said amount of compensation.

[29] In their affidavits in reply the appellants denied any knowledge that the second respondent was responsible for the payment of compensation. They pointed out that the payments were made by the first respondent by cheques issued by the state's corporate arm, namely, the Menteri Besar Negeri Sembilan (Incorporation). They asserted that they accepted the compensation under protest and that they signed the letters of acknowledgment merely as evidence of such acceptance and it should not be construed as taking away their right to refer their objection to the court or that they were satisfied with the amount of compensation. Indeed the first respondent had by consent order dated 15 June 2001 agreed to their application for an extension of time to file their objection for reference to the court although such application would not have been necessary had the first respondent being vigilant and processed their earlier objection promptly. The second respondent did not produce any documentary evidence that it had in fact made the payments through the first respondent for purposes of the acquisition, apart from its bare assertion in its affidavits.

[30] The appellants further contended that they had never received the said Form H from the first respondent nor did they sign them. It is not denied that even some of the Forms H exhibited by the second respondent were not even signed by the first respondent.

[31] The first respondent did not file any affidavit to show that Form H had been duly served on the appellants. That being the case the second respondent's assertion that the appellants had accepted the compensation without protest remained unsubstantiated.

[32] The learned judge did not make any specific ruling or finding of fact on whether or not the appellants accepted the compensation with or without protest. It appeared that he disregarded the second respondent's contention that the appellants had accepted the compensation without protest in view of the extension of time granted by the court. There was ample evidence before the court to support the appellants' contention that they accepted the compensation under protest. The appellants' previous solicitors' letter dated 17 January 1995 enclosing nine copies of Form N was duly acknowledged by the first respondent on 27 January 1995. In its letter dated 30 October 2000 the first respondent admitted that the appellants did in fact file their objection through their previous solicitors (see exh. TNK 8). In view of such evidence the appellants were not barred by s. 37(1) of the Act from filing their objection to the amount of compensation. It was the first respondent who did not process their earlier objection and referred the matter to the court as required by s. 38(5) of the Act.

[33] The learned judge allowed the second respondent's application and dismissed or struck off the land reference on the sole ground that there was no evidence that the appellants had filed their objection in Form N within the thirty days period as allowed by the court, that is by or before 15 July 2001.

[34] This is what the court said:

> Berikutan dari perintah tersebut, maka satu-satunya isu yang perlu diputuskan di dalam permohonan semasa ialah samada Borang N telah diserahkan kepada Pentadbir Tanah Daerah Seremban oleh pemohon-pemohon atau peguam mereka dalam tempoh 30 hari dari tarikh perintah berkenaan.

[35] The court held that Form N was not filed within time and accordingly granted the second respondent's application to dismiss or strike out the land reference by the appellants.

[36] The appeal by the appellants is against the said decision. Upon a close scrutiny of the appeal record, it is abundantly clear that the conclusion by the court that the appellants' objection in

Form N was filed out of time was erroneous and against the weight of evidence. The covering letter from the appellants' solicitors dated 12 July 2001 enclosing fresh copies of Form N together with the requisite deposit as required by s. 39 of the Act was duly received and acknowledged by the first respondent on 13 July 2001 (exh. TNK10). That was well within the thirty day period granted by the court. This is an obvious case where the appellate court is justified to interfere and rectify the error. In *Siaw Kim Seong v. Siew Swee Yin & Anor* [2008] 5 CLJ 441 the Court of Appeal, at p. 446 said:

> In an ordinary case involving findings of fact, we do, as a general rule defer to the opinion formed by the judge who is audio-visually advantaged. But where the primary trier of fact has failed to judicially appreciate the evidence before him, this court will – indeed it is duty bound to – interfere and correct the error. In this behalf we need do no more than to quote from what we said in *Lee Ing Chin v. Gan Yook Chin* [2003] 2 AMR 357; [2003] 2 CLJ 19 which was approved by the Federal Court when it went to them on second appeal:
>
> > A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same.

On this ground alone the appeal ought to be allowed.

[37] The second respondent's contention that the appellants accepted the compensation without protest by relying upon Form H and thereby precluded from filing the objection on the amount of compensation by s. 37(1) of the Act is misconceived and

untenable. Form H, as it then was, did not contain any stipulation that an interested person must state whether he accepted the compensation under protest or otherwise. He was only required to sign the form as an acknowledgment that he had received the compensation or that he did not accept the offer of compensation by the Land Administrator.

[38] Form H in this case was issued on 30 July 1994. It was subsequently amended and replaced by a new Form H by the Land Acquisition (Amendment) Act 1997 (Act A 999) which came into force on 1 March 1998. It is only in the new Form H that any interested person is required to state whether or not he accepts the offer of compensation under protest.

[39] In any event, none of the appellants had signed the said Form H and their contention that they were never served with the said form remained unrebutted as the first respondent did not file any affidavit to state to the contrary.

[40] I have had the privilege of reading the judgment in draft of my learned brother Suriyadi Halim Omar and I am in agreement with him that the second respondent's application to dismiss or strike out the land reference by way of a summon-in-chambers was not made in accordance with the mandatory provision of s. 45 of the Act, which requires that every proceeding under Part V shall take place in open court. It is manifestly clear from the order of the court that the proceeding in the High Court took place in chambers and not in open court.

[41] For the aforesaid reasons, I agree with my learned brother that the appeal by the appellants be allowed with costs, the order of the High Court be set aside, the land reference be reinstated and that the deposit be refunded to the appellants.